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IN THE

Supreme Court of the United States

No. 552

R. A. HABERMAN, JR., Independent Executor of the Estate of ELIZABETH H. GRAVIS, Deceased,
PETITIONER,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
RESPONDENT.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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TO THE HONORABLE SUPREME COURT OF
THE UNITED STATES:

R. A. Haberman, Jr., as Independent Executor of the Estate of Elizabeth H. Gravis, deceased, prays that writ of Certiorari issue to review the judgment entered in this case on the 30th day of June, 1955, by the United States Court of Appeals for the Fifth Circuit.

REPORT OF OPINION

The District Court did not write an opinion. The opinion of the Court of Appeals was reported in 224 F. 2d 401 and petition for rehearing denied in 225 F. 2d 837. (Appendix A, pp. 18-38).

JURISDICTION

The judgment below was entered on the 30th day of June, 1955. The order overruling the petition for rehearing was entered on the 16th day of September, 1955. The jurisdiction of this Court is conferred by Section 1254(1) of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Whether the refund annuity contract in this case is a "security" under Sec. 2a of the Texas Securities Act, Article 600a, R.C.S. of Texas, 1925. (App. B, p. 38).

2. Whether Respondent is subject to the provisions of Article 2031a, R.C.S. of Texas, (App. C, p. 39), requiring the filing with the Secretary of State of the State of Texas of a designation of an agent for service. Petitioner contends that respondent is subject to said Statute.

STATUTES INVOLVED

The Texas Securities Act, Article 600a, R.C.S. of Texas 1925, Sections 2(a), and 33(a).

Article 2031-1, R.C.S. of Texas 1925. (App. D, p. 40).

Article 2031a, R.C.S. of Texas 1925.

STATEMENT

The case was submitted to the Court of Appeals under a short agreed statement of the case under Rule 76, F.R.C.P.

On April 8th, 1948, respondent issued the immediate annuity contract in question in the face amount of $50,000.00 to Mrs. Elizabeth H. Gravis. She paid $50,000.00 cash. The annuity was an installment refund annuity, as distinguished from a cash refund annuity. (See definitions, App. E, p. 40). The contract was labeled by respondent simply as a "refund annuity" (Exhibit A, Tr. 9-12). It called for monthly payments of $142.25, beginning April 20th, 1946. On December 19th, 1949, the contract was amended by lowering the monthly payments to $124.69, and simultaneously therewith a lump sum of $4,001.15 was made to Mrs. Gravis for the purpose of paying Federal taxes. The annuitant died February 15th, 1953. The total paid the annuitant during her lifetime was $10,996.92. Equitable paid Mrs. Gravis' estate and the estate accepted "without prejudice" $25,811.38, the same being the commuted value of the unpaid installments at Mrs. Gravis' death. The petitioner made demand on respondent for a total of $35,001.93, which was the difference between the $50,000.00 consideration paid by Mrs. Gravis and the total sum repaid by respondent. Respondent brought a declaratory judgment suit to determine whether it owed the additional $9,199.55. The trial court granted the respondent's motion for summary judgment, and the petitioner appealed to the Fifth Court of Appeals, which court affirmed the judgment of the trial court.

Petitioner contends that the annuity contract is void for two reasons: (1) The contract is a security, as defined by the Texas Securities Act; and (2) The respondent is subject to Article 2031a, R.C.S. of Texas, requiring the filing of a designation of an agent for service. If either act applies, the contract is void. Admittedly, the respondent did not comply with either Act. It contends that the annuity contract in question is not a security within the defi-

nition of that term in the Texas Securities Act, Section 2(a). It contends that it is not subject to Article 2031a, because it is a foreign insurance corporation and has complied with the Texas Insurance Code for the designation of an agent for service. It contends that Article 2031a does not apply to foreign life insurance corporations.

There are no decisions of the Texas courts construing the two statutes on the precise questions involved here.

The Federal District Court had jurisdiction because of diversity of citizenship and the amount involved.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

Rule 19 of the Rules of this Court sets out some of the reasons which this Court will consider in granting writs. Included therein is the reason: "Where a Court of Appeals has rendered a decision * * * or has decided an important state or territorial question in a way in conflict with applicable state or territorial law." This reason applies to both questions in this case.

The security question:

Section 2a of the Texas Securities Act defines a security as follows:

> "The term 'security' or 'securities' shall include any share, stock, treasury stock, stock certificate under a voting trust agreement, collateral trust certificate, equipment trust certificate, preorganization certificate, note, bond, debenture, mortgage certificate or other evidence of indebtedness, any form of commercial paper, certificate in or under a profit sharing or participation agreement, certificate or any instrument presenting any interest in or under an oil, gas or mining lease, fee or title, or

> any certificate or instrument representing or secured by an interest in any or all of the capital, property, assets, profits or earnings of any company, investment contract, or any other instrument commonly known as a security, whether similar to those herein referred to or not."

This is a broad and sweeping definition, without any exclusions. The annuity sued on would fit several of the descriptive terms. However, for this application, petitioner designates only one term as being adequate to describe the annuity, which term is "investment contract." Eliminating all the other portions of the definition, then, the definition section of the Act would read as applicable here, "The term 'security' or 'securities' shall include any * * * investment contract * * *."

An annuity has been definitely held to be an investment by the Texas courts. **Daniel vs. Life Insurance Company of Virginia**, Tex. Civ. App. (1937), 102 S.W. 2d 256, defined an annuity contract as:

> "It is essentially a form of investment, and uniformly held to be purely such, regardless of the fact that in its usual form payments are contingent upon continuity of the life of the grantee. In some forms of annuity, not even this contingency exists."

Although the **Daniel** case was forcefully brought to the attention of the Court of Appeals, that Court completely ignored this decision in its opinion, and held contrary to it. Although the **Daniel** case was not construing the Texas Securities Act, it was defining the term "annuity." The definition given by that Court was particularly applicable to the refund annuity sued on herein. To Petitioner, the question seems so simple. The Securities Act says that a security is any investment contract. The Texas courts define an annuity as an investment contract. This should end the matter.

The **Daniel** case is now a landmark case in the jurisprudence of this nation on the analysis and definition of an annuity, and it has been cited with approval by courts in at least eleven state jurisdictions, and by two Federal Courts of Appeal.1/

The **Daniel** case is supported by a number of other decisions and texts which recognize an annuity to be an investment contract.

Gregg vs. Commissioner, 315 Mass. 704, 54 N.E. 2d 169, 150 A.L.R. 1280. The Massachusetts Court in this case was construing one of Equitable's deferred refund annuities, and said:

> "He (annuitant) was building up a fund at the rate of $2,400 a year for the primary purpose of acquiring monthly payments during the rest of his life after he had become sixty-five years of age. He was making an investment for his own personal benefit."

1/ Texas: Union Central Life Ins. Co. vs. Mann, 158 S.W. 2d 479; Lockhart, et al, vs. American United Life Ins. Co., 181 S.W. 2d 610 (7); Lockhart, et al, vs. American Mutual Life Ins. Co., 194 S.W. 2d 288; Lawyers Title Ins. Corporation vs. Board of Insurance Commissioners, et al, 207 S.W. 2d 977 (1); Lawyers Title Ins. Corporation vs. Board of Insurance Commissioners, et al, 207 S.W. 2d 977 (5). Federal cases, Louisiana: Chew's Estate vs. Commissioner of Internal Revenue, 148 F. 2d 79 (2); Mutual Life Ins. Co. of New York vs. Landry, 148 F. 2d 703 (3). Arkansas: State ex rel Holt, Atty. Gen. vs. New York Life Ins. Co., 131 S.W. 2d 643 (7). Missouri: State ex rel AEtna Life Ins. Co. vs. Lucas, et al, 153 S.W. 2d 12 (5). California: Equitable Life Assurance Society of the United States vs. Johnson, State Treasurer, 127 P. 2d 105. Georgia: Wolfe vs. Breman, 26 S.E. 2d 638. Kansas: Equitable Life Assurance Society of the United States vs. Hobbs, Commissioner of Insurance, 114 P. 2d 873; and Equitable Life Assurance Society of the United States vs. Hobbs, Commissioner of Insurance, 114 P. 2d 880. Massachusetts: Gregg vs. Commissioner of Corporation and Taxation, 54 N.E. 2d 173. Mississippi: State vs. Mutual Life Ins. Co. of New York, 196 So. 800. North Dakoa: State et al vs. Equitable Life Assurance Society of the United States, 282 N.W. 413; and State et al vs. Equitable Life Assurance Society of the United States, 282 N.W. 421. Wyoming: State ex rel Equitable Life Assurance Society of the United States, 88 P. 2d 486. 109 A.L.R. 1061 note follows NY and PENN. cases. 109 A.L.R. 1243 note "What constitutes Insurance." New cases, Arizona: Corp. Commission, et al, vs. Equitable Life Assurance Society of the United States, 239 P. 2d 363; Nebraska: Bankers Life Ins. Co. vs. Laughlin, 70 N.W. 2d 481.

The Court in that case continually referred to the refund annuity as an "investment." It cited the **Daniel** case.

Garos vs. Commission, (N. H. Sup. Ct. 1954), 109 A. 2d 844. This Court held that an annuity contract is one "by which the annuitant protects himself, during his life, by making an investment * * *."

Corporation Commissioner vs. Equitable Life Assurance Society, 73 Ariz. 171, 239 P. 2d 360:

> "The annuities are not indemnities for death, but investments for life. They are designated as safeguards against misfortune and want during the life of annuitant, and are essential provisions for life, and not provisions for death."

That court went on to state that an annuity was an investment of funds to be paid in installments during the life of the annuitant.

In Re Atkins Estate, N. J. Eq., 18 A. 2d 45, recognized an annuity as an investment which would do two things: (1) assure the receipt by the annuitant of a desired annual sum during his life, and (2) the assurance that if he should die prematurely, that his estate would not suffer loss of the payment he has not yet received.

Carroll vs. Equitable Life Assurance Society, 9 F. S. 223:

> "The granting of annuity contract is in the nature of an investment * * *."

Appleman Insurance Law and Practice, Vol, 1. p. 76:

> "Annuity contracts must, therefore, be recognized as investments, rather than as insurance."

Further citations are unnecessary to support the language of the **Daniel** case that an annuity contract is "uniformly" held to be "purely" an investment.

The Court of Appeals held in its opinion:

> "In fact, we would not regard 'investment contract' as a correct description of an annuity. While annuities are sometimes called investments, that is not an apt characterization."

The Court cites absolutely no authority in holding that an annuity contract is not an investment contract. The Court's holding is directly contrary to the holding in the **Daniel** case. Simply stating the obvious, the Court of Appeals disagreed with the holding of the **Daniel** case. In this it was in error. In a matter involving Texas law, the Texas decisions are controlling, particularly so when that Texas decision is recognized as a landmark case in the nation's jurisprudence on the point involved.

Any annuity is an investment. There cannot be any doubt but what a refund annuity is an investment contract. Petitioner sincerely believes that the Court of Appeals did not understand the nature of the contract as calling for a refund of the consideration paid, whether the annuitant lived or not. There are three basic immediate annuities: straight life, installment refund, and cash refund. The three are defined in App. E, p. 40. The annuity sued on was an installment refund annuity. The Court of Appeals said that the contract was "aleatory and contingent," and repeatedly referred to the annuity contract as being "aleatory." Even respondent will not state to this court that its refund annuity was aleatory, as that term is defined by standard dictionaries. Respondent has litigated in the courts of the nation to distinguish an annuity contract from a life insurance contract. A life insurance contract is aleatory. The contract sued on called for a full return of the consideration paid (whether on a cash, installment, or commuted installment basis is not material here). The contract

called for participation in annual dividends (Tr. p. 12). The term "invest" is defined:

> "To lay out (money or capital) in business with the view of obtaining an income or profit; to convert into some form of wealth other than money, usually of a more or less permanent form and as a means of obtaining income or profit; * * *"

The term "investment" is defined:

> "The investing of money or capital; the laying out of money in the purchase of some species of property, esp. A source of income or profit; the amount of money invested, or that in which money is invested."

(Webster's **New** International Dictionary).

An annuitant desires to guarantee future income. What would have been the difference if the annuitant had invested her money in a stock, note, bond, debenture, or mortgage certificate? All of these call for a return of the consideration and bear interest. The only possible difference is the life contingency feature of the annuity. However, the life contingency feature of an annuity does not alter its investment characteristics.

This has been clearly held in the decisions, including the case of **Gregg vs. Commissioner,** 315 Mass. 704, 54 N.E. 2d 169, 150 A.L.R. 1280, cited above. The Massachusetts Court was construing one of Equitable's refund annuities, and said:

> "He (the annuitant) was making an investment for his own personal benefit. It was made in the expectation of living and not in contemplation of death. It is true that the contract contained a provision for the payment of a death benefit, but that

> provision was inserted in order that the annuitant should not lose all his investment if death came to him before annuity payments became due from the society."

And again,

> "The annuity contract in the instant case was based not upon the contingency of death but upon the expectation of living. The appellant's husband did not submit to a physical examination by any physician before the contract of annuity was executed. The only possible risk that the society took was that the annuitant might live too long. It took no risk whatever with reference to the death benefit for in no event was it required to pay more than it had received. It was not bound to pay a certain lump sum irrespective of the amount paid in as a life company is required to pay upon the death of the insured. An annuity is not an indemnity against loss by death like a life policy. A man purchases an annuity for his own benefit but one usually obtains life insurance for the protection of his dependents."

The Supreme Court of New Hampshire, in the recent case of **Garos vs. Commissioner,** (1954), 109 A. 2d 844, cited above, is to the same effect. The Court held that an annuity contract is one "* * * by which the annuitant protects himself during his life, by making an investment which will assure the receipt by him of an adequate or desired sum during his life, with the further assurance that if he should die prematurely, his estate, or those whom he desires to receive distribution thereof, will not suffer the loss of the repayment he has himself not yet received."

These facts are without dispute in this case: (1) The annuity contract sued on called for an absolute return of the consideration paid; and (2) The annuity contract parti-

cipated in annual dividends. If it was not an investment contract, then what was it? The courts of this nation have uniformly held it to be purely an investment contract. The lone exception is the judgment and opinion of the Court of Appeals in this case. The **Texas Securities Act** provides that the term "securities" includes "any investment contract." A refund annuity is an investment contract. The refund annuity sued on is therefore a security under the Texas Securities Act.

A further reason for granting the writ in question is that under the decision of the Court of Appeals, annuity contracts in Texas are sold to the public free of any control or supervision by any public agency, whether Federal or State. The **Federal Securities Act**, 15 U.S.C.A. 77c, exempts annuities. The **Texas Insurance Code** (because of the holding in the **Daniel** case) does not require either the filing or approval of annuity contracts with the Texas Board of Insurance Commissioners (reserves for annuities sold by life insurance companies are required by the Code). The **Texas Securities Act** goes further than the **Federal Securities Act**, in that it requires both registration and approval of the security by the State. The annuity contract sued on was not filed with or approved by any public agency whatsoever. It is a contract which affects the public interest. If it is not an investment within the terms of the **Texas Securities Act**, then it is in a legal void, although it is a contract offered to the public, which admittedly affects the public interest, and which admittedly needs to be and should be supervised and controlled. It is only under the **Texas Securities Act** that the contract can be controlled by a public agency. It is taken from under this Act only by a strained construction which completely ignores Texas decisions, and which

completely ignores many other sound decisions over the nation. It is a strained construction which is obviously based on an inaccurate understanding by the Court of Appeals of the nature of the annuity contract it attempted to construe.

The decision of the Court of Appeals not only permits respondent, with its several billion dollars in assets, to offer to the public this $50,000 annuity free of public control, but it also permits every $25,000 limited capital stock insurance company in Texas to also issue it free of public control. (There are several hundred such companies chartered in Texas).

Respondent will admit that if the annuity in question is held to be a security under the **Texas Securities Act,** that its refund annuity sued on is void, and that petitioner is entitled to receive back the balance of its consideration paid, to wit, $9,199.55, with legal interest at six per cent. **Section 33a, Texas Securities Act,** Appendix F, p. 41.

Designation of Agent Question:

This question involves a construction of Article 2031a, R.C.S. of Texas, Appendix C, p. 39. Petitioner contends that the failure of respondent to comply with Article 2031a made the annuity contract absolutely void. The Court of Appeals apparently was of the view that petitioners were correct, or at least the Court was in serious doubt as to the arguments advanced there by respondent, for the Court avoided deciding the question on its merits. It invoked the rule that since the contract was executed, it did not need to decide the question of the applicability of **Article 2031a.** The application of such rule by the Court of Appeals was error. The Court of Appeals admits that the Texas Courts have not adopted the rule, and that the rule is not uni-

versally adopted. The rule does not apply because 2031a is plain and unambiguous in setting forth the public policy of the State, which is that all acts of violators of 2031a are absolutely void. The Court of Appeals in **McLean v. York Oilfield Supply Company,** 138 Fed. 2d 804, said that 2031a was "drastic."

An analysis of the statute makes this conclusive. The State Legislature was not content to say only that the acts of such a corporation will be "void," but stated that the acts would be "unlawful and void." To make certain that its intent was understood, the Legislature then negatived the possibility of any act of such corporation being lawful — "* * * none of its acts shall, as to it, be valid." The Legislature was not content to stop even with this language, but further provided in the same sentence, "* * * and it shall be incapable in this State of receiving the benefit of exercising in its behalf or enjoying any right, power, privilege, or immunity that shall not have already accrued." In Section 5b, it denied such corporation the right to sue in the courts of Texas. A penal fine was imposed in Section 5c. The Statute did not repeal any other statute, but was cumulative of all such.

Where Legislative intent is this plain, even the authorities cited by the Court of Appeals acknowledged the fact that such are absolutely void. See 7 **A.L.R.** 2d 264, where it was said:

> "The state evidently intended to make consequences of violating the law so great as to force obedience to it."

The effect of the ruling of the Court of Appeals is, therefore, to give effect to a void contract. The Texas courts hold without question that when the Texas Legislature uses the term "void," it means just that — void. In **Kadane**

vs. Clark, 143 S.W. 2d 197, the Texas Supreme Court, in construing the **Texas Securities Act,** said:

> "The great weight of authority sustains the rule that the Legislature has the power to enact such laws, and that all contracts in violation thereof are void."

That Court also said in that case:

> "Any other construction would nullify the very purpose for which it was enacted."

The Court of Appeals for the Fifth Circuit, in the case of **McLean vs. York Oilfield Supply Company,** 138 Fed. 2d 804, was construing Article 1529 and 1536, R.C.S. of Texas (Permits for Foreign Corporations). The Court there pointed out that such statutes do not declare the acts of the violators to be void, but merely provide that the State will not assist the delinquent corporation in enforcing its rights, if any, and concluded by saying:

> "It is not intended to make it and all who transact business with it, such lawbreakers as that their contracts are wholly unlawful. The true purpose of the Legislature is to be sought, and the contracts made are not to be held unlawful, if that is not the legislature purpose, the penalty being a matter between the State and the delinquent corporation only."

That Court then recognized that the Texas Legislature had the power to also impose the penalty of making acts of such delinquent corporations wholly void by stating:

> "But, according to the last cited authorities, Midland Linseed Products Company vs. Warren Bros. Company, 6 Cir., 46 Fed. 2d 870, if the contract sued on is illegal and void, under the law of

> Texas, it will not be enforced, whether by a Federal Court or a State Court. It is well established in Texas, as elsewhere, that a contract to do a thing absolutely prohibited by a valid statute is void."

The Court then contrasted **Article 2031a** with **Articles 1529** and **1436,** and stated that **2031a** was "drastic."

The contract in question is no less void than it would be if the statute did not contain the language "none of its acts, as to it, shall be valid," as the Court of Appeals seems to intimate with the language that "* * * such a void contract is not, however, altogether without legal effect." It is altogether without legal effect, as far as respondent is concerned. That is the plain meaning of the Statute. With this language, "as to it," the Legislature was merely codifying the established rule that such Statutes are intended for the protection, and not the oppression, of citizens dealing with such defaulting corporation. 23 **Am. Jur.** 318, Foreign Corporations, Section 342.

Where contracts are absolutely void, they cannot have the breath of life put into them or the stamp of legal respectability placed on them, when the plain intent of the Legislature is that they shall be absolutely without legal force and effect. The annuity contract in question is "unlawful" and "void." As to Equitable, it is not valid. The Court of Appeals has given effect to an illegal contract.

Respondent argued in the Court of Appeals that it was illogical to contend that it was required to designate two agents for service in the State of Texas. Petitioner contends such is not an unreasonable requirement of a foreign insurance corporation, and that whether it is wise or unwise is exclusively a Legislative matter. **City of San Antonio vs. Criner,** Tex. Civ. App. (1954), 270 S. W. 2d 460, writ of error refused by Texas Supreme Court.

If the annuity contract in question was made void by the Statutes of Texas, then petitioner is entitled to have the courts enforce this right.

CONCLUSION

It is perhaps unfortunate that the questions presented here could not have been decided in the Texas courts. Federal Jurisdiction was legitimately invoked by respondent. However, Federal jurisdiction does not call for ignoring the decisions of the Texas courts, or for ignoring the plain and unambiguous language of the Texas statutes. It is important that this case be decided in conformity with Texas decisions and Texas Statutes, as well as the established law of the land.

WHEREFORE, petitioner prays that its Petition for Writ of Certiorari from this Court to the Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

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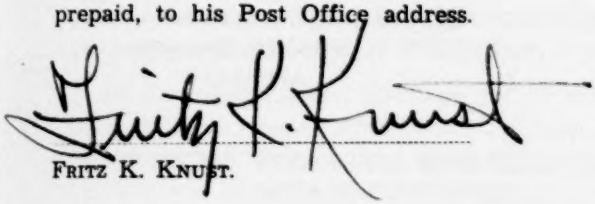
I hereby certify that I have delivered a copy of the above Application for Writ of Certiorari to counsel of record by depositing in the United States Mail, with first class postage prepaid, to his Post Office address.



FRITZ K. KNUST.

APPENDIX

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15330

R. A. HABERMAN, JR., Independent Executor of the Estate of ELIZABETH H. GRAVIS, Deceased,
APPELLANT,

versus

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
APPELLEE.

Appeal from the United States District Court for the Western District of Texas.

(June 30, 1955.)

Before HUTCHESON, Chief Judge, and TUTTLE and CAMERON, Circuit Judges.

TUTTLE, Circuit Judge: This appeal is from a declaratory judgment holding that appellant, hereinafter called Haberman, is not entitled to restitution or refund of the

consideration paid by his testatrix to appellee, hereinafter called Equitable, for a certain annuity policy, in excess of the payments already made to testatrix or her estate. The following statement of the facts and issues is adapted from the agreed statement made by the parties in accordance with rule 76, Federal Rules of Civil Procedure.

Haberman is a resident of San Antonio, Texas, and Equitable is a New York corporation conducting a life insurance and annuity business in Texas. On April 8, 1946, Equitable issued to Mrs. Elizabeth H. Gravis of San Antonio its Refund Annuity No. 12,142,208, for $50,000 paid by Mr. Gravis. Haberman, Mrs. Gravis' brother and financial advisor, handled, on her behalf, the negotiations for and purchase of the annuity.

At all material times, Equitable had complied with the laws of Texas relating specifically to foreign corporations engaged in the life insurance and annuity business in that State. It had obtained from the Board of Insurance Commissioners of Texas pursuant to Vernon's Texas Civil Statutes, Art. 4751 (now Art. 3.57, Tex. Ins. Code), a Certificate of Authority expressly authorizing Equitable "to transact life, health, accident and annuity insurance in the State of Texas." The agent who represented Equitable in the sale of the annuity to Mrs. Gravis had been duly licensed by the Board of Insurance Commissioners of Texas, pursuant to Art. 5068b (now Art. 21.07, Tex. Ins. Code). Equitable had appointed the Chairman of the Board of Insurance Commissioners of Texas as its agent for service of process, as required by Art. 4763 (now Art. 3.65, Tex. Ins. Code).

Equitable had not registered the annuity as a "security" under the Texas Securities Act, Art. 600a, nor qualified under that act as a "securities dealer." Its agent had not been licensed or registered under that act as a "securities

dealer" or "securities salesman." Nor had Equitable filed a power of attorney with the Secretary of State of Texas designating a resident agent for service of process under Art. 2031a.

The terms of the annuity provided that Equitable should pay Mrs. Gravis $142.25 monthly for the remainder of her life, commencing April 20, 1946; provisions thereof regarding payments to be made after the death of Mrs. Gravis read as follows:

> "Refund. If, upon the death of the Annuitant while this contract is in force, the sum of the Annuity payments which have become due under this contract is less than the consideration, the Society will continue the payment of the Annuity, as each payment becomes due, to the beneficiary as hereinafter designated until the total amount of the Annuity payments made by the Society equals the consideration, the final payment to be of an amount equal to the excess of the consideration over the total Annuity payments previously made by the Society, subject, however, to any provision for commutation in the provision hereof entitled 'Beneficiary.'
>
> "Beneficiary
>
> "1. Annuity payments which become due after the death of the Annuitant shall be paid to the Annuitant's brother, Rudolph A. Haberman, Jr., (herein called the beneficiary, with reservation of the right to change the beneficiary).
>
> * * * * * *
>
> "3. If the executors of the administrators of the Annuitant be not expressly designated as beneficiary, any unpaid Annuity payments, with respect to which there is no designated beneficiary living

> when such payments become due, shall be paid to the executors or administrators of the survivor of the Annuitant and beneficiary. Any Annuity payments becoming due to the executors or administrators of any person shall be commuted on the basis of 2½% per annum compound interest and paid in a single sum to such executors or administrators."

While Haberman was originally designated as beneficiary, Mrs. Gravis later changed the beneficiary to her mother and father. However, Mrs. Gravis' mother and father were killed in an automobile accident several years prior to Mrs. Gravis, death, and there were no other designations of a beneficiary under the annuity contract.

The monthly payments of $142.25 were paid to Mrs. Gravis by Equitable from April 20, 1946, through November 20, 1949. On December 19, 1949, at the request of Mrs. Gravis, to enable her to pay certain tax deficiences, the annuity was surrendered and rewritten so as to reduce the consideration stated from $50,000 to $43,827.77, and the monthly payments from $142.25 to $124.69; in exchange for which Equitable paid over to Mrs. Gravis and the Collector of Internal Revenue the sum of $4,001.15. All other terms of the rewritten annuity were the same as in the original, and there is no dispute here in connection with the fairness or propriety of that transaction. Equitable paid the reduced monthly installments to Mrs. Gravis from December 20, 1949, through January 20, 1953; it also paid her $918.18 in dividends on the annuity during her lifetime. Mrs. Gravis died February 15, 1953.

Since the total amount of monthly installments paid to Mrs. Gravis, $10,996.92, was substantially less than the consideration paid, additional payments were due under the "Refund" provisions of the annuity set out above.

Equitable interpreted these provisions as calling for the payment to Haberman as executor of Mrs. Gravis' estate, of the lump sum of $25,811.38, this being the commuted value, at 2½% compound interest, of the additional monthly installments which would have been required to make the total amount of monthly payments under the annuity equal the consideration.

Haberman, on the other hand, contended that Equitable was obligated to pay the estate $35,001.93, which is the difference between the original $50,000 consideration and the total amount, other than dividends, previously paid to Mrs. Gravis, namely $10,996.92 in monthly payments and $4,001.15 on the rewriting of the annuity. Equitable paid Haberman the $25,811.25 it admitted to be due, which payment was accepted by Haberman on July 17, 1953, "without prejudice" to the rights of the parties.

Haberman tendered to Equitable the annuity and the $918.18 paid as dividends under the annuity, demanded the additional sum of $9,190.55, and threatened suit if payment was not made. Equitable thereupon brought this declaratory judgment action to determine whether it was liable for the $9,190.55 or any part thereof, and for an injunction against further threats. Haberman counterclaimed for the $9,190.55 with interest.

The trial court granted Equitable's motion for summary judgment, and Haberman appealed, relying on three points:

(1) Haberman contends that the annuity is a "security" as defined in the Texas Securities Act, and that, since the provisions of the Texas Securities Act were not complied with in connection with the issuance and sale of the annuity, and the agent who sold the annuity was not a registered securities dealer or salesman, and Equitable was not a registered securities dealer, the annuity is voidable

at Haberman's election, pursuant to §33a of the Act. Equitable contends, on the other hand, that the annuity is not a "security" as that term is defined in the Texas Securities Act, and, therefore, that the provisions of that Act have no application to the annuity nor to the issuance and sale thereof.

(2) Haberman contends that under the terms of Art. 2031a, Texas Civil Statutes, Equitable was required to file with the Secretary of State of Texas a power of attorney designating some resident of Texas as its agent upon whom process might be served, and that having failed to file such designation with the Secretary of State, Equitable's acts in Texas, including the issuance and sale of the annuity, are either void or voidable. Equitable contends, on the other hand, that Art. 2031a has no application to a foreign life insurance company which has complied with all of the provisions of the Texas Insurance Code, including the obtaining of a Certificate of Authority issued by the Board of Insurance Commissioners of Texas authorizing it to transact a life insurance and annuity business in Texas and the appointment of the Chairman of the Board of Insurance Commissioners of Texas as the Company's agent for service of process.

(3) Haberman contends that the annuity is ambiguous, being susceptible of the interpretation that the amount payable to the estate of the annuitant upon her death was to be $35,001.93, and the ambiguity should be resolved against Equitable. Equitable contends that the annuity is unambiguous and can mean only that upon annuitant's death with no beneficiary surviving her, it was obliged to pay her estate a lump sum representing the commuted or discounted value, at 2½% per annum compound interest, of the additional monthly installments which would have

been required to make the total amount of all monthly payments under the annuity equal to the consideration, this sum being $25,811.33.

We shall consider these points in the order named.

(1) The Texas Securities Act, Art. 600a, Texas Civil Statutes, defines a security as follows:

> "Sec. 2(a) The term 'security' or 'securities' shall include any share, stock, treasury stock, stock certificate under a voting trust agreement, collateral trust certificate, equipment trust certificate, pre-organization certificate or receipt, subscription or reorganization certificate, note, bond, debenture, mortgage certificate or other evidence of indebtedness, any form of commercial paper, certificate in or under a profit sharing or participation agreement, certificate or any instrument representing any interest in or under an oil, gas, or mining lease, fee or title, or any certificate or instrument representing or secured by an interest in any or all of the capital, property, assets, profits or earnings of any other instrument commonly known as a security, whether similar to those herein referred to or not."

Appellant contends that this definition embraces the annuity policy involved here. Appellee does not claim any of the eighteen specific statutory exemptions carved out of the defined category, but contends as a matter of law on the agreed facts, that the policy is not within the limits of the definition. We agree that this is a question of law and that §4 of Art. 600a, placing the burden of proof of any specific exemption on the party claiming it, has no application here as appellant would have us believe.

Although the definition quoted above is not as precise as might be desired in reference to the specific question

confronting us, we are convinced that such annuities are not securities subject to the provisions of Art. 600a. Appellant relies entirely on the general words "other evidence of indebtedness," "investment contract," and "any other instrument commonly known as a security whether similar to those herein referred to or not." But we do not interpret these words as including the annuity involved here. The words "or other evidence of indebtedness" must be construed according to the rule of *ejusdem generis*. 50 Am. Jur., "Statutes" §249. Certainly, even assuming that an annuity is an evidence of indebtedness—a questionable assumption in view of the aleatory and contingent nature of the amount ultimately to be paid—it is not of the same sort as a note, bond, debenture, or mortgage certificate. Hence, it is not comprehended by these general words.

The rule of construction that the meaning of statutory words is to be determined by their context, or *noscitur a sociis*, should be applied in determining the meaning of "investment contract" in the Texas Act. These words having no fixed technical significance, their meaning must be ascertained from the specific terms in connection with which they are used; that is, they should be interpreted as referring to instruments of the same general type as the specifically enumerated ones. It seems certain to us that the Legislature meant by this language to give color and scope to the specific terms, and to fill in any interstitial loopholes in the area staked out, so to speak, by the specific terms; not to extend that area radically so as to include quite dissimilar things which have precise and well known names, which the Legislature could easily have included expressly had it wished to do so. Certainly annuities issued by regulated insurance companies are not at all similar to the securities specifically enumerated in the statute. In fact,

we would not regard "investment contract" as a correct description of an annuity. While annuities are sometimes called investments, that is not an apt characterization. Indeed, it is not unusual to hear a person say he is investing in a new suit or a new car, but the essence of such transactions is really quite different. An annuity is also quite different; what makes it essentially an annuity is that it is a form of risk-sharing. In life insurance, the risk from which protection is usually sought is that the insured may die young without provision for his dependents; in an annuity, the risk is that the annuitant may live long, outliving his means for his own support. To the extent that insurance or annuities are risk-sharing, they are certainly not investments. It is true that investment or other objectives can be combined in such plans, but they are not of their essence. Besides, we perceive a striking difference between the instruments specifically included in the definition, on the one hand, and insurance and annuity policies of regulated companies, on the other; the latter are governed by a special statutory scheme, and reserves are required by law to be maintained for them. Thus we think the general words "investment contract" cannot be reasonably interpreted as including something so dissimilar to the specifically named instruments, as the annuity in this case. Whether they might include an annuity issued by one not a regulated insurance company, we need not decide.

As for the words, "any other instrument commonly known as a security," we do not recall a single instance in which we have heard an annuity called a security either by the learned or the vulgar. The diligent search of appellant's counsel has not disclosed to us a single instance; several authorities are cited which call an annuity an "investment," but that is quite another matter. We cannot

therefore reasonably construe these words as including the annuity in question.

Appellant argues further that since the Texas Act does not specifically exempt such annuities although the Federal Securities Act does,1/ the Texas definition of security, modelled after the Federal one, must include annuities. But we agree with appellee that the Report of the House Committee on the Federal Securities Act destroys this argument, based as it is on legislative intent:

> "The above exemption [set forth in footnote 1] makes clear what is already implied in the Act, namely, that insurance policies are not to be regarded as securities subject to the provisions of the Act. The insurance policy and like contracts are not regarded in the commercial world as securities offered to the public for investment purposes. The entire tenor of the Act would lead, even without this specific exemption, to the exclusion of insurance policies from the provisions of the Act, but the specific exemption is included to make misinterpretation impossible. House Committee Report, No. 85, 73rd Congress, First Session, p. 15." 1 CCH Federal Security Law Service ¶2231.

The case of *Hamilton v. Pennsylvania Mutual Life Ins. Co.*, 196 Miss 345, 17 So. 2d 278, squarely supports our holding herein. See also *Rinn v. New York Life Ins. Co.*, 7th Cir., 89 F. 2d 924; *Bates v. Equitable Life Assurance Society*, 206 Minn. 482, 288 N.W. 834; Annotation, 163 A.L.R. 1050.

1/ 15 U.S.C.A. §77c(8) exempts from the Federal Securities Act—

"Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions of any State or Territory of the United States or the District of Columbia."

(2) Appellant's second argument is based on Texas Civil Statutes, Art. 2031(a), which provides in pertinent part:

> "Art. 2031a. Power of attorney designating resident for service of process; penalty for failure to file.
>
> "Section 1. No foreign corporation shall transact or do any business in this State without first having filed in the office of the Secretary of State a power of attorney designating some individual who is a resident citizen of this State, as its service agent, upon whom process may be served in all suits, proceedings and causes of action, pending or hereafter filed in this State, in which said foreign corporation is a party or is to be made a party.
>
> * * * * * *
>
> "Sec. 5. If any corporation which is required by the terms of this Act to file the power of attorney and designate a service agent and to keep and maintain such agent or his successor within this State at the address designated in such power of attorney as provided by this Act, shall fail to do so, then and in such event:
>
> "(a) Each of its acts in this State shall, as to it, be unlawful and void and none of such acts shall, as to it, be valid; and it shall be incapable in this State of receiving the benefit of exercising in its behalf or enjoying any right, power, privilege or immunity that shall not already have accrued, provided that none of its acts done subsequently to the filing of such a power of attorney, though such filing be late, shall be affected by the foregoing provisions, nor in case of such late filing shall the incapacity affected by the foregoing provisions apply to any right, power, privilege or immunity that

shall have wholly arisen and accrued after such filing.

"(b) Such corporation shall be incapacitated to maintain any suit or legal proceedings in any Court in this State upon any demand whether arising out of contract or tort."

Appellant contends that this statute makes the annuity void as to Equitable and that he is entitled thereby to rescind the annuity and recover the consideration paid, upon restoration to Equitable of the payments and dividends already received by him or his testatrix. Equitable replies to this that other Texas statutes show that foreign insurance companies are to be governed only by the Texas Insurance Code, and that Art. 2031a does not apply to Equitable, even though on its face it applies to all foreign corporations doing business within the state. Texas Insurance Code, Arts. 21.42, 21.43; Vernon's Texas Civil Statutes, Art. 1538.

We do not need to decide whether those statutes have the effect claimed by Equitable. We think that whether or not §2031a applies to foreign insurance companies, under the circumstances of this case Haberman is not entitled to restitution. We shall assume, without deciding, that Equitable's failure to comply with §2031a made the annuity "void" in the sense of the statute. Such a "void" contract is not however, altogether without legal effect. The other party may recover on a contract made in violation of §2031a. *Hayden v. Dallas County*, Tex. Civ. App., 143 S. W. 2d 990; 6 Williston, Contracts (Rev. Ed.) §1773. And furthermore,

"In the absence of constitutional or statutory provisions expressly providing otherwise, the rule is quite general that while a contract entered into by

> a foreign corporation which has not complied with the conditions of doing business in the state would be void or voidable while still executory, and so not enforceable by the corporation, the contract, after it has been fully executed, is to be treated as a valid contract, and the corporation may maintain or defend its rights arising under the contract." 23 Am. Jur., "Foreign Corporations," 1954 Pocket Supp., §356.

See also Annotation, 7 A.L.R. 2d 256, where more than a score of cases supporting this view are collected. Only one case there appears really contrary. *Flinn v. Gillen*, 320 Mo. 1047, 10 S. W. 2d 923. The case of *Edward v. Ioor*, 205 Mich. 617, 172 N. W. 620, 15 A.L.R. 256, involved the Blue Sky Law, which obviously is based on different policy considerations, from the statutes requiring licensing or designation of service agents by foreign corporations in general, and that case may be regarded as distinguishable, from the present one on this point. See *Gill v. S. H. B. Corp.*, 322 Mich. 700, 34 N.W. 2d 526, 7 A.L.R. 2d 252. There do not seem to be any Texas cases in point, but we believe that Texas would follow the majority view.
point. See *Gill v. S. H. B. Corp.*, 322 Mich. 700, 34 N.W. 2d 526, 7 A.L.R. 2d 262. There do not seem to be any Texas cases in point, but we believe that Texas would follow the majority view.

Now, the contract should not be regarded as fully performed on the part of Equitable in this case; Equitable paid the monthly installments to Mrs. Gravis during her lifetime and provided her with the assurance of an undiminished income during her lifetime, which was a primary object of the annuity; and upon her death tendered what we are convinced was the full amount due to Haber-

man as her executor, according to the terms of the annuity; and finally, paid that amount to Haberman "without prejudice" to the rights of the parties. But for this reservation of rights by Haberman, we think the contract would now be fully performed by its terms. But regardless of this reservation of rights, there was a substantial part performance and a tender of full performance. Should we not regard this tender as having the same effect as full performance in cutting off the power of rescission? The object of the statute being to protect citizens of Texas from imposition by foreign corporations, is not this object fulfilled by a tender of full performance, the tender being kept good, just as it is by actual full performance? We think that it is. A valid tender of certain types of obligation discharges them. 6 Williston §1803. In the case of an obligation to pay money, as in the present case, a tender does not discharge the debt, but it has practically all other effects as would payment. It discharges the security for the debt and cuts off interest and the right to costs from the date of tender. Thus in many ways the obligation is treated as if it were performed. 6 Willison §1817. This is not unreasonable, since a tender would amount, by definition, to complete performance if it were accepted. Only the obligee, not the obligor, is to blame that the obligation is not then fully performed. Thus, we think it is quite proper for us to hold that the tender of full performance cut off Haberman's assumed right to rescind the annuity, though we have found no cases from Texas, nor indeed from other jurisdictions, precisely in point./2

We think this rule is especially reasonable with respect to aleatory contracts, as annuity contracts. Here, the annui-

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2/*Cf.* the authority that substantial performance may excuse a condition requiring full performance. 3 Williston §842.

tant sought protection from the risk that she might not have the means to support herself in her old age. She obtained that protection at a time when its value was fortuitous and actuarial. In fact, she lived less than eight years after the issuance of the annuity, but the average life expectancy at her age was actually thirty or forty years. Had she lived a normal life span, she would have received more than the consideration paid, and her beneficiary or estate would be entitled to nothing. The protection from risk would therefore seem to be the principal benefit sought by the annuitant. Since she received that protection fully it seems right to regard the insurance company's obligation as so substantially executed, that her executor has no power of rescission. An analagous case may make this clearer: Suppose a foreign corporation not fully qualified to do business in Texas insures its $50,000 building there for a $100 premium. The building is destroyed by fire. Would it not be reasonable to make a distinction between the insurer's right to rescind before and after the loss? See Restatement, Contracts §293; 3 Williston §889. When, coupled with this circumstance that the fortuitous event has happened, there is both substantial performance and tender of full performance, as in the present case, we think the Texas courts would treat the contract as valid in spite of Art. 2031a.

What we have said on this point may be expressed also in terms of a more general legal principle. It is clear that any right of Haberman to recover must rest on an action for money had and received, an action based on a rescission, or an action for a rescission and an accounting. All of these are forms of action to which the rule stated in Restatement, Restitution §142, is applicable:

"§142. Change of Circumstances.

(1) The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution. * * *"

We think that such a change of circumstances is clearly present in the present case, which terminated completely the right to restitution. See also Restatement, Contracts §§486, 600, 601.

Although he has not thus far raised the issue, appellant may object that, granted our assumption that Art. 2031a applies to a foreign insurance company, the court has no jurisdiction of the action because §5(b) of that Article incapacitates Equitable from bringing any action. However, this objection has no merit even under the assumption made. Such a statute disabling a foreign corporation from bringing an action does not disable it from defending an action (*Home Forum Ben. Order v. Jones*, 20 Tex. Civ. App. 68, 48 S. W. 219; 23 Am. Jur. "Foreign Corporations" §335; Annotation, 17 L.R.A., N.S., 1117); consequently Equitable could defend the counterclaim in the present action. That counterclaim was a compulsory counterclaim under Rule 13(a), Federal Rules of Civil Procedure, and even if the complaint be dismissed, a compulsory counterclaim is not required to be dismissed where it is supported by a proper ground of federal jurisdiction. *Pioche Mines Consol. v. Fidelity-Philadelphia Trust Co.*, 9th Cir., 206 F. 2d 336, cert. denied 346 U. S. 899, 74 S. Ct. 225, 98 L. Ed. 400; *Isenberg v. Biddle*, 75 U.S. App. D.C. 100, 125 F. 2d 741; 3 Moore's Federal Practice §13.15. Here, federal jurisdiction of the counterclaim is present because there was diversity of

citizenship and the requisite amount in controversy. Consequently, whether or not Equitable had the capacity to bring this action, this court has and the court below had, jurisdiction, Haberman having allowed the action and counterclaim to go to final judgment on the merits.

(3) Haberman's final argument is that the annuity is ambiguous and that the ambiguity should be resolved against Equitable so as to give him the $9,190.55 he claims. The text of the annuity is quite clear and susceptible to no other interpretation than that claimed by Equitable. Haberman urges that the caption on the title page, "Refund Annuity," "With continuation of payments until consideration has been returned," and the same words at the bottom of page one of the annuity, conflict with the words on page two on which Equitable relies:

> "Any annuity payments becoming due to the executors or administrators of any person shall be commuted on the basis of 2½% per annum compound interest and paid in a single sum to such executors or administrators."

We cannot agree with Haberman's contention. Taking the contract as a whole, no reasonable person could conclude that it meant anything other than what Equitable contends it means. Certainly there is nothing to support Haberman's claimed interpretation. The words "with continuation of payments until consideration has been returned" standing by themselves might indicate that periodic payments were to be continued after the annuitant's death, but not that her executor should be entitled to an accelerated lump sum payment of remaining future payments. This leaves the caption of the instrument "Refund Annuity" to support Haberman's interpretation. These words do not express any intention inconsistent with the text of the policy. On

the contrary, the text makes it very clear in what sense the annuity was a refund annuity; the consideration was to be refunded in periodic payments to the annuitant, or if she died before the entire amount was repaid, then to the named beneficiary. If there was no surviving named beneficiary, then the discounted present value of the remaining installments was to be paid to her estate. By Haberman's interpretation, the annuitant's estate would receive a windfall in the form of immediate repayment of the consideration not yet refunded, instead of future payments or their immediate discounted value. Surely there is no indication that the parties intended such a windfall to occur. Thus, this contention is likewise without merit.

~~A final observation concerning Haberman's claimed right to restitution; the agreed statement of facts shows that Mrs. Gravis did not pay the consideration for the annuity, but that Mr. Gravis (presumably her husband) did. There is nothing in the record to show how Haberman might have any claim to Mr. Gravis' rights to restitution of the consideration paid, and it would seem that he, his heirs, legatees, or assigns might have a better right than Mrs. Gravis' estate, if any such right existed~~.

(See opinion on rehearing dated Sept. 16, 1955.)

The court below did not err, and its judgment is

AFFIRMED.

JUDGMENT

Extract from the Minutes of June 30, 1955

No. 15330

R. A. HABERMAN, JR., Independent Executor of the Estate of ELIZABETH H. GRAVIS, DECEASED,

versus

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel,

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, R. A. Haberman, Jr., Independent Executor of the Estate of Elizabeth H. Gravis, Deceased, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15330

R. A. HABERMAN, JR., Independent Executor of the Estate of ELIZABETH H. GRAVIS, Deceased,
APPELLANT,

versus

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
APPELLEE.

Appeal from the United States District Court for the Western District of Texas.

(September 16, 1955.)

ON PETITION FOR REHEARING.

Before HUTCHESON, Chief Judge, and TUTTLE and CAMERON, Circuit Judges.

PER CURIAM: Appellant has drawn the Court's attention to an incorrect statement of fact in the last paragraph of the opinion. It was there stated that the consideration for the annuity was paid by "Mr. Gravis." This is

consistent with the corrected printed record in the case. However, the original record discloses that the consideration for the annuity was paid by "Mrs. Gravis." The last paragraph of our original opinion, therefore, becomes inappropriate and inapplicable, and it is stricken.

This paragraph having been no part of the *ratio decidendi* and there being no merit in the motion for rehearing, the same is, therefore, DENIED.

APPENDIX B

The Texas Securities Act, Article 600a, R.C.S. of Texas.

> "Sec. 2(a) The term 'security' or 'securties' shall include any share, stock, treasury stock, stock certificate under a voting trust agreement, collateral trust certificate, equipment trust certificate, preorganization certificate or receipt, subscription or reorganization certificate, note, bond, debenture, mortgage certificate or other evidence of indebtedness, any form of commercial paper, certificate in or under a profit sharing or participation agreement, certificate or any instrument representing any interest in or under an oil, gas or mining lease, fee or title, or any certificate or instrument representing or secured by an interest in any or all of the capital, property, assets, profits or earnings of any company, investment contract, or any other instrument commonly known as a security, whether similar to those herein referred to or not."

APPENDIX C

Chapter 3, Title 42, R.C.S. of Texas:

"Art. 2031a. Power of attorney designating resident for service of progress; penalty for failure to file

"Section 1. No foreign corporation shall transact or do any business in this State without first having filed in the office of the Secretary of State a power of attorney designating some individual who is a resident citizen of this State, as its service agent, upon whom process may be served in all suits, proceedings and causes of action, pending or hereafter filed in this State, in which said foreign corporation is a party or is to be made a party."

"Sec. 5. If any corporation which is required by the terms of this Act to file the power of attorney and designate a service agent and to keep and maintain such agent or his successor within this State at the address designated in such power of attorney as provided by this Act, shall fail to do so, then and in such event:

"a) Each of its acts in this State shall, as to it, be unlawful and void and none of such acts shall, as to it, be valid; and it shall be incapable in this State of receiving the benefit of exercising in its behalf or enjoying any right, power, privilege or immunity that shall not already have accrued, provided that none of its acts done subsequently to the filing of such a power of attorney, though such filing be late, shall be affected by the foregoing provisions, nor in case of such late filing shall the incapacity affected by the foregoing provisions apply to any right, power, privilege or immunity that shall have wholly arisen and accrued after such filing.

"(b) Such corporation shall be incapacitated to maintain any suit or legal proceedings in any Court in this State upon any demand whether arising out of contract or tort."

APPENDIX D

Art. 2031-1, *R.C.S. of Texas* 1925—*Construction of Act*

"Nothing herein contained shall be construed as repealing any statute in this State in reference to service of process on foreign corporations, but this Act shall be construed and held comulative of all existing statutes, and service of process in all suits against foreign corporations may be had as is provided for herein or by any other method provided by law. Acts 1935, 44th Leg., 2nd C.S., p. 1688, ch. 431, Sec. 2."

APPENDIX E

1946 *Unique Manual*, p. 1916.

"*The Straight Life Annuity.* The Straight Life Annuity provides a life income without death benefit or cash value.

"*The Installment Refund Annuity.* The Installment Refund Annuity provides a death benefit in the form of a continuation of income to a beneficiary after death of annuitant until total income payments equal total premium paid by the annuitant. The cash value of such a contract (if allowed) is the commuted value of future income payments necessary to equal the single premium.

"*The Cash Refund Annuity.* The Cash Refund Annuity differs from the Installment Refund Annuity in the death benefit. The difference between income received and premium paid is returned in one lump-sum rather than by continuation of income. The cash value if allowed is the death benefit less a small surrender charge during the early years (usually first two years)."

APPENDIX F

The Texas Securities Act, Article 600a, R.C.S. of Texas.

"Sec. 33a. Every sale or contract of sale of any security made in violation of any provision of this Chapter shall be voidable at the election of the purchaser, who shall be entitled to recover from the seller in an action at law, upon tender to the seller of the security sold, in proper form for transfer, together with the amount of all dividends, interest, and other income and distributions received by the purchaser from or upon such security, the full amount paid by such purchaser for such security, with interest from the date of purchase; * * * "

FILED
DEC 27 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 552

R. A. HABERMAN, JR., Independent Executor of the Estate of Elizabeth H. Gravis, Deceased,
Petitioner,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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In The

Supreme Court of the United States

October Term, 1955

No. 552

R. A. Haberman, Jr., Independent Executor of the Estate of Elizabeth H. Gravis, Deceased,

Petitioner,

v.

The Equitable Life Assurance Society of the United States,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

Argument

Petitioner's application for certiorari is based upon the contention that the decision of the Court of Appeals (which is reproduced in Appendix A of the Petition, pp. 18-38) is in conflict with the applicable law of the State of Texas on two questions, namely:

1. Is the Refund Annuity sold by respondent to Mrs. Gravis a "security" within the meaning of that term as used in the Texas Securities Act, Art. 600a, Revised Civil Statutes of Texas; and
2. Is such annuity "void", and therefore subject to rescission by petitioner, because respondent did not

comply with Art. 2031a, Revised Civil Statutes of Texas?

It is respondent's position that no such conflict exists, that the Court of Appeals decided the case correctly, and, therefore, that the petition is without merit and should be denied.

Petitioner himself admits, at page 4 of his brief, that:

> "There are no decisions of the Texas courts construing the two statutes on the precise questions involved here."

If such be the case, and respondent agrees that it is, it is difficult to see how the decision of the Court of Appeals could be in conflict with applicable state law.

As a matter of fact, there simply is no applicable state law on the "security" question. So far as the law of Texas is concerned, the question is definitely one of first impression, although it has been decided (contrary to petitioner's contention) in three other jurisdictions, as noted below.

With respect to the second question (i.e., the effect of respondent's non-compliance with Art. 2031a), while here, too, there are no Texas decisions directly in point, there are several Texas cases, to say nothing of numerous cases from other jurisdictions, which indicate rather clearly that the Texas courts would undoubtedly reach the identical result as that reached by the Court of Appeals.

Accordingly, there certainly is no conflict between the decision below and applicable state law. It is apparent, therefore, that petitioner is asking this Court to grant certiorari simply for the purpose of substituting its own view for that of the Court of Appeals as to how the courts of Texas would decide the two questions mentioned above. This is not only contrary to the long standing policy of

this Court, *Stern & Gressman, Supreme Court Practice,* 119-120 (2d ed., 1954), but is also directly opposed to the frequently expressed opinion of this Court that the Courts of Appeals are particularly qualified to determine and apply the laws of the several states within their respective circuits and that, accordingly, their decisions regarding state law will not be reviewed by this Court unless they are arbitrary or unreasonable. For example, in *Propper* v. *Clark,* 337 U. S. 472, 486-487 (1948), this Court said:

> "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable. . . .
>
> "Since the determination of the state law issue . . . by the courts below is not unreasonable, we accept it as correct for the purposes of this case."

And in *Spiegel* v. *Commissioner,* 335 U.S. 701 (1949), this Court said, at pages 707-708:

> "The questioned ruling was made by three judges who are constantly required to pass upon Illinois law questions . . . It is sufficient for us to say that we think reasonable arguments can be based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances, we will follow our general policy and leave undisturbed this Court of Appeals' holding on the question of state law."

See also, *Gardner* v. *New Jersey,* 329 U.S. 565, 582-583 (1947); *Hillsborough* v. *Cromwell,* 326 U.S. 620, 629-630 (1946); *Helvering* v. *Stuart,* 317 U.S. 154, 162-165 (1942); *MacGregor* v. *State Mutual Assurance Co.,* 315 U.S. 280

(1942). These, and many other, decisions of this Court make it clear that where there is no conflict between the Court of Appeals' decision and applicable state law, a petition for certiorari will be denied unless the petitioner can show that the decision below was unreasonable or arbitrary.

An Annuity Is Not A "Security"

Obviously, there is nothing unreasonable or arbitrary about the Court of Appeals' holding on the "security" question. On the contrary, the Court of Appeals was entirely correct, as a matter of law, in holding that respondent's Refund Annuity contract is *not* a "security" within the meaning of that term as used in the Texas Securities Act. The Court of Appeals' opinion on this point (Appendix A of the Petition, pp. 24-27) speaks eloquently in its own behalf and requires no additional support from us except, perhaps, to emphasize that petitioner's only authority for his argument that an annuity is a "security" is a line of cases, represented in Texas by *Daniel* v. *Life Insurance Co. of Virginia*, 102 S.W. 2d 256 (Tex. Civ. App. 1937), holding that an annuity contract *differs from* a policy of insurance. Specifically, *Daniel* held that a gross receipts tax on foreign life insurance companies measured by "premiums . . . collected *upon policies of insurance*" did not apply to the considerations paid to the insurance company for annuities sold by it. In so holding, the court reasoned that "in general parlance insurance does not include contracts of annuity" and "absent something in the context or other portions of the statutes showing a different legislative intent . . . the words 'premiums on insurance' must be given their generally accepted meaning." The case had *absolutely nothing* whatever to do with the Texas Securities Act, nor with the question whether an annuity is a "security" under that Act or other-

wise. Moreover, the Court's characterization of an annuity as an "investment" was dicta, pure and simple.

Petitioner has seized upon this dicta in the *Daniel* case, together with the phrase "investment contract" which appears in the statutory definition of the word "security" in the Texas Securities Act, and has parlayed these two isolated, unconnected and not particularly apt expressions into a flimsy argument that an annuity is a "security" within the statutory definition of that term. That is literally all there is to petitioner's argument.

As the Court of Appeals pointed out, petitioner's argument is completely contrary to the ordinarily accepted meaning of the terms "annuity" and "security". Moreover, the three cases in point from other jurisdictions, to-wit: *Hamilton* v. *Penn. Mutual Life Insurance Co.*, 196 Miss. 345, 17 So. 2d 278 (1944); *Bates* v. *Equitable Life Assurance Society of the U. S.*, 206 Minn. 482, 288 N.W. 834 (1939); and *Rinn* v. *New York Life Insurance Co.*, 89 F. 2d 924 (C.A. 7 1937), *all* support respondent's contention that an annuity is *not* a "security" as that term is used in "Blue-sky" and "Securities" legislation. While *Bates* and *Rinn* involved statutory language somewhat different from that contained in the Texas Securities Act, *Hamilton* is on all fours with the instant case since the definition of the term "security" in the Mississippi statute was almost identical with that in the Texas Securities Act. The Mississippi statute provided that:

> "The term 'securities' as used in this Act, shall mean and include any stocks, treasury stock, bond, debenture, transferable certificate of interest or participation, certificate of interest in an oil, gas or mining title or lease, collateral, trust certificate, monthly installment savings bond or certificate, diversified trustee shares, or transferable share, *investment contract* or beneficial interest, whatsoever in, or title to, property or profits, or any

instrument commonly known as a security" (4 Miss. Code, 1952, Sec. 5361).*

The defendant admitted that the annuities had not been registered and sold in compliance with the Mississippi Blue Sky law, but contended that they were not subject thereto, just as respondent contends in this case with respect to the Texas Securities Act. In upholding this contention, the Mississippi Supreme Court reasoned as follows (p. 280):

> "These annuity policies, though not life insurance policies, are such as a life insurance company is authorized to issue and therefore are subject to the provisions of our statute regulating the business of life insurance companies, 4 Miss. Code, 1942, Sec. 5630, *and not to the requirements, in this connection, of the Blue Sky Law.*"

Precisely the same reasoning was applied by the Court of Appeals in rejecting petitioner's argument that respondent's annuity came within the definition of "security" in the Texas Securities Act. In this connection, Judge Tuttle said (App. A of Petition, p. 26):

> ". . . we perceive a striking difference between the instruments specifically included in the definition, on the one hand, and insurance and annuity policies of regulated companies, on the other; *the latter are governed by a special statutory scheme,* and reserves are required by law to be maintained for them. Thus we think the general words "investment contract" cannot be reasonably interpreted as including something so dissimilar to the specifically named instruments, as the annuity in this case."

Certainly it is reasonable to assume that if the case at bar had been litigated in the Texas courts they would have applied the same reasoning and would have reached the same

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* Emphasis supplied throughout this brief.

result as did the Court of Appeals and courts in the three jurisdictions cited above, namely, that an annuity issued by a regulated life insurance company is *not* a "security". On the other hand, it is entirely unreasonable to take the position, as does petitioner, that the Texas courts would reject the only authorities in point to reach a decision, purely on the basis of semantics and violative of the commonly accepted significance of the words involved which would subject the issuing company to regulation under *both* the Insurance Code *and* the Blue Sky Law.

Accordingly, we submit that the Court of Appeals not only decided the "security" question correctly, but also decided it exactly the same way the Texas courts would have decided it. It follows, therefore, that there is no merit whatsoever in petitioner's claim of conflict on this point.

Petitioner Has No Right Of Rescission Under Art. 2031a

Art. 2031a, R.C.S. Tex. 1925, prohibits a "foreign corporation" from transacting business in Texas until it has filed in the office of the Secretary of State a power of attorney designating a resident of Texas as its agent upon whom process may be served. The statute renders "void" any act in Texas of a foreign corporation "which is required by the terms of this Act to file the power of attorney", but which has failed to do so.

Petitioner contends that Art. 2031a applies to respondent and that, because of respondent's noncompliance with the statute, the annuity sold by respondent to Mrs. Gravis, is "void" and, although fully executed by respondent, can, nevertheless, be rescinded by petitioner.

Respondent contends, on the other hand, that since it is engaged in Texas in the *life insurance* business, it is subject to the provisions of the Texas Insurance Code, and not to the laws relating generally to "foreign corporations". Specifically, respondent contends that, having designated

the Chairman of the Board of Insurance Commissioners as its resident agent for service of process in Texas pursuant to Art. 4763 (now Art. 3.65 of the Texas Insurance Code), respondent is not and never has been obligated to file *another* designation in the office of the Secretary of State pursuant to Art. 2031a.

The Court of Appeals felt that it was unnecessary to decide whether Art. 2031a applies to foreign life insurance companies, because, the contract having been fully performed. petitioner was not entitled to rescission in any event.

The rule that a fully executed contract is not subject to rescission on the ground of alleged illegality is not only a rule of general application, as stated by the Court of Appeals, but is unquestionably the law of Texas as well. In *Woolsey* v. *Panhandle Refining Co.*, 131 Tex. 449, 116 S.W. 2d 675, 678 (1938), the Supreme Court of Texas reaffirmed the rule which had been established in Texas as early as 1886, saying:

> "Associate Justice Stayton in Davis v. Sittig, supra (65 Tex. 497), after discussing the rule controlling the construction of illegal contracts, quoted as follows from Pomeroy on Equity, p. 940: 'If the contract has been voluntarily *executed and performed*, a court of equity will not, in the absence of controlling motives of public policy to the contrary, grant its aid by decreeing a recovery back of the money paid or the property delivered, or a cancellation of the conveyance of transfer'."

This reluctance by the courts to rescind a fully executed contract on the grounds of illegality has found particular expression, as indicated by the numerous authorities cited by the Court of Appeals in its opinion, in the almost universally accepted rule that noncompliance with regulatory statutes by foreign corporations will not justify rescission of a fully executed contract. This regard for the integrity

of fully executed contracts has been read into statutes which condemn, in the most unreserved terms, contracts made by a noncomplying foreign corporation.

For example, in *Gill* v. *S.H.B. Corp.*, 322 Mich. 700, 34 N.W. 2d 526 (1948), 7 A.L.R. 2d 256, the plaintiff sought to rescind an amendment to a contract, such amendment having been made *after* the foreign corporation's certificate had been revoked because of failure to pay taxes. The Michigan statute provided that an unrevoked certificate was a prerequisite to "making a valid contract in this state". The court held that the statute could not be employed as a means of rescinding a fully executed contract.

To the same effect is *Carolin Mfg. Corp.* v. *George S. May*, 312 Mich. 487, 20 N.W. 2d 283 (1945), which involved an action to recover money paid under a personal service contract on the ground that the contract was illegal because defendant was an unlicensed foreign corporation. The holding here was an alternative holding, but the case is particularly interesting because of its bearing on the Court of Appeals' statement that the rule protecting executed contracts against rescission is especially appropriate to the type of contract involved in this case. The court in the *Carolin* case, *supra*, said at p. 289:

> "Plaintiff's claim, in the final analysis, is somewhat analogous to a rescission of a contract because it was illegal not in the sense of malum in se but malum prohibitum. Had this been an executory contract, there would be merit in plaintiff's contention, but here we have an executed contract where plaintiff cannot return consideration consisting entirely of personal services. We do not believe that plaintiff can keep all the benefits of a contract and at the same time recover what it had paid for them."

Similarly, in the instant case, Mrs. Gravis (the annuitant) received all the benefits of the annuity during her lifetime,

consisting not only of regular monthly payments but also the peace of mind that goes with the certainty that one will have financial security for the rest of one's life. That security, which the annuity gave Mrs. Gravis prior to her death, cannot be returned by petitioner, and it would be manifestly unjust to permit petitioner to rescind the contract at this time.

See, also, *McMillan* v. *Pawnee Petroleum Co.*, 151 Okla. 4, 1 P. 2d 755 (1931), where plaintiff sought the cancellation of a deed on the ground of noncompliance by the defendant with an Oklahoma statute providing that:

> "If any such foreign corporation shall fail to comply with the foregoing provisions of this article, *all of its contracts* with citizens of this State . . . *shall be void* as to the corporation, and no court of this State shall enforce the same in favor of the corporation."

The language of this statute, particularly the use of the word "void", is quite similar to that of Art. 2031a, and yet the Oklahoma court had no difficulty in concluding that this drastic statute did not enable a party to rescind a fully executed contract.

For a more extensive collection of authorities see Annotation, 7 A.L.R. 2d 256 (1949).

Petitioner's argument against the decision of the Court of Appeals turns on the doubtful proposition that the Texas courts have never specifically held that a fully executed contract could not be rescinded even though pronounced "void" under Art. 2031a, and that the language of the statute precludes an interpretation disallowing such rescission. In other words, petitioner argues that the Texas courts would, for some unexplained reason, reject the rule which our Supreme Court reaffirmed in *Woolsey* v. *Panhandle Refining Co., supra,* as having been the law of Texas since 1886, and would also reject the almost unanimous authorities from

other jurisdictions that even though a contract be declared "void" or "voidable" for noncompliance with some statutory regulation, it can not be rescinded after it has been fully executed. Petitioner has made no showing whatsoever, either in reason or authority, as to why the Texas courts would depart from this well-established rule. In this connection, it is obvious that statements from Texas' decisions that the legislature has the power to make contracts "void", or that a contract prohibited by statute is "void", shed no light on the question at all. Accordingly, petitioner again has not only failed to show any conflict between the decision below and applicable State law, but has also failed to show that the decision below is in any way unreasonable or arbitrary. Therefore, petitioner has not made out a case for the granting of certiorari and the petition should be denied.

However, we wish to make it clear that respondent does not rely solely or even primarily upon the rule that fully executed contracts made by a corporation in violation of a regulatory statute will not be rescinded. In fact, that rule was applied by the Court of Appeals on its own motion, and not at the suggestion or request of respondent. Respondent's contention before both of the lower courts was that Art. 2031a is inapplicable to foreign *insurance* companies, and it was so held by the District Court. Since the Court of Appeals found is unnecessary to decide that point, respondent's principal contention regarding Art. 2031a is not really set out in the Record before this Court.

Admittedly, respondent has never complied or attempted to comply with Art. 2031a. However, respondent has at all material times complied with the *parallel* provision of the Texas Insurance Code (formerly Art. 4763, now Art. 3.65) requiring a foreign life insurance company during business in Texas to appoint the Chairman of the Board of Insurance Commissioners as its resident agent for service of process.

We wish to emphasize this point, so that the Court will not be under the impression that respondent had no resident agent for service in Texas.

What petitioner's argument, therefore, really boils down to is that respondent should have filed a designation of a resident agent for service of process, *not only with the Board of Insurance Commissioners, as it admittedly did* under Art. 4763, but *also* in the office of *the Secretary of State* under Art. 2031a, and that, since respondent did not file such additional designation in the office of the Secretary of State, all of respondent's acts performed in this State (presumably dating back to the time of respondent's original admission to Texas) are "void".

We submit that the laws of Texas are not so absurd as petitioner has tried to make them appear. Despite the unqualified reference in Art. 2031a to "foreign corporations", we think it is clear that this general statute has no application to foreign *life insurance companies* doing business in Texas *pursuant to the laws of Texas specifically governing such matters.* The following provisions of the Texas Insurance Code, which were taken substantially unchanged from corresponding statutes originally enacted by the Texas Legislature in 1903, show clearly and conclusively that the activities of foreign insurance companies in Texas are to be *governed by the laws of Texas relating specifically to insurance and insurance companies*, and not by our *general* corporation laws:

> "Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby . . ." (Art. 21.42).
>
> * * *

> "The provisions of this code are conditions upon which foreign insurance corporations shall be permitted to do business within this State, and any such foreign corporation engaged in issuing contracts or policies within this State shall be held to have assented thereto as a condition precedent to its right to engage in such business within this State." (Art. 21.43).

Moreover, Art. 1538, R.C.S. Tex. 1925, which is a part of Chapter 19, entitled "Foreign Corporations", provides that:

> "The provisions of this chapter shall not apply to ... such corporations as are required by law to procure certificates of authority to do business from the *Commissioner of Insurance* ..."

This statute has been held to exempt foreign *insurance* companies from the requirement applicable to foreign corporations generally that they qualify under our "foreign corporation" laws before doing business in Texas. *Hartford Fire Insurance Co.* v. *Galveston H. & S.A. Railway Co.*, 239 S.W. 919 (Tex. Comm. App. 1922); *American National Insurance Co.* v. *U.S.F. & G. Co.*, 24 S.W 2d 474 (Tex. Civ. App. 1929); *Price* v. *American Surety Co.*, 59 S.W. 2d 426 (Tex. Civ. App. 1933). True, Art. 1538 refers specifically to "the provisions of *this chapter*", i.e., Chapter 19, and, technically speaking, Art. 2031a is not included in Chapter 19 in the codification of the Texas statutes. However, Art. 1538 was adopted in 1903, *long before* the Legislature enacted Art. 2031a in 1933. It seems reasonable to believe that the Legislature was referring to the *same* corporations when it used the words "foreign corporation" in Art. 2031a as were included within those same words when used in the other "foreign corporation" statutes which are contained

in Chapter 19. Therefore, respondent contends that the specific exemption provided by Art. 1538 is applicable, by construction, not only to the articles which the codifier grouped together in Chapter 19, but to other, and particularly to *subsequent*, legislation dealing generally with "foreign corporations", including Art. 2031a, under the well-settled rule that statutes "in pari materia", i.e., dealing with the *same subject matter*, will be construed together and reconciled wherever possible. As stated in 82 CORPUS JURIS SECUNDUM 803 (Statutes, § 366):

> "Under the so-called 'pari materia' rule of construction, it is well established that in the construction of a particular statute, or in the interpretation of its provisions, *all statutes relating to the same subject . . . should be read in connection with it;* and such related statutes may or should be construed together as though they constituted one law . . . and the legislative intention must be ascertained, not alone from the literal meaning of the words of a statute, *but from a view of the whole system of which it is a part.* This rule of construction applies although the statutes to be contrued together were enacted at different times, and contain no reference to one another; *and it is immaterial that the statutes are found in different chapters of the revised statutes and under different headings.*"

We urge that, under any reasonable interpretation of the Texas statutes, respondent, having complied with Art. 3.63 of the Insurance Code, was *not* required to file an *additional* designation with the Secretary of State. Admittedly, there is no Texas decision so holding. Therefore, while the question is one involving Texas law, it is entirely proper, indeed necessary, to look for guidance to the authorities from other jurisdictions. Petitioner cannot point to a single case from any jurisdiction in which it was held that an insurance

company had to file duplicating or overlapping designations of an agent for service of process. On the contrary, the authorities hold otherwise. The leading case of *St. Louis, etc. Ry. Co.* v. *Commercial Union Insurance Co.*, 139 U.S. 223 (1891), is directly in point. This case involved the precise question raised by petitioner, that is, whether a foreign insurance company which had designated an agent for service of process in compliance with a specific requirement of the *insurance* laws of the state (Arkansas), was *also* required to file an *additional* designation with the Secretary of State pursuant to a statute applicable by its express language to "*any* foreign corporation", and to which there was no stated exception whatsoever.

Pointing out that the Arkansas statutes regulating foreign insurance companies long antedated the general foreign corporation laws of that state (as is also true in the case of Texas), this Court held squarely that, since the insurance company had filed the designation required by the *insurance* laws of Arkansas, it was *not obligated* to file an *additional* designation under the foreign corporation laws. It is especially significant, we think, that this decision was reached not on the basis of any *express* exemption or exclusion of insurance companies from the broad comprehensive language used in the Arkansas statute applicable to foreign corporations(this statute by its terms was applicable to "*any* foreign corporation") but on the basis of the following reasoning which, we submit, is precisely applicable, to the case at bar:

> "It thus appears that the State of Arkansas had established and maintained a distinct system with regard to foreign insurance companies, under the superintendence of the state auditor, by which every such company was required to file with the auditor a stipula-

tion for the service of process upon it, as well as to make full returns of its condition and business to that officer, to report to him the names of all its agents within the state, and to receive from him certificates of authority for itself and for each of its agents.

"Such being the settled policy of the State with regard to foreign insurance companies, *they cannot reasonably be held to be governed by the acts concerning foreign corporations generally,* which required a certificate to be filed with the Secretary of State, designating an agent upon whom service might be made, and stating the principal place of business of the corporation within the State. To construe that act as including foreign insurance companies would require the drawing of one of two equally improbable inferences; either that the only stipulation of such companies for service of process upon them should be filed in a different public office from that in which all other returns and documents relating to such corporations are preserved; or else that their stipulations for such service must be filed both with the auditor and with the Secretary of State.

"For these reasons, we are satisfied that the omission of the plaintiffs to file in the office of the Secretary of State the certificates required by the statutes of Arkansas of April 4, 1887, c. 135, was no bar to this action; . . ." (139 U.S. 223, 234).

See, also, *John Hancock Mutual Life Insurance Co.* v. *Lookingbill,* 218 Ia. 373, 253 N.W. 604 (1934), where the court flatly rejected the contention that an insurance company must secure a permit to do business from *both* the Insurance Commissioner *and* the Secretary of State, this contention being based on the Ohio general corporation law which required a permit from the Secretary of State for *all* foreign corporations, without any express exemption of insurance companies.

Conclusion

It is apparent from the foregoing that the decision of the Court of Appeals is not in conflict with applicable Texas law in any respect. It is likewise apparent that the Court of Appeals decided the case correctly and as it would have been decided by the Texas courts.

For these reasons, it is respectfully submitted that this petition for a writ of certiorari is without merit and should be denied.

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Certificate of Service

I hereby certify that I have delivered a copy of the above Brief in Opposition to counsel of record for the petitioner by depositing the same in the United States mail, with first class postage prepaid, addressed to counsel of record at his post office address.

F. G. Coates

F. G. Coates